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No. 07-468

FILED
NOV 8 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Petitioners,

—v.—

NATIONAL SECURITY AGENCY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICI CURIAE* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, BAR ASSOCIATION OF SAN FRANCISCO, BEVERLY HILLS BAR ASSOCIATION, BOSTON BAR ASSOCIATION, THE LOS ANGELES COUNTY BAR ASSOCIATION, AND THE PHILADELPHIA BAR ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTERESTS OF *AMICI CURIAE*[1]

The Association of the Bar of the City of New York

Founded in 1870, the Association of the Bar of the City of New York (the "NYC Bar"), is a professional organization of more than 22,000 attorneys. Through its many standing committees, such as its Committee on Civil Rights, the NYC Bar educates the Bar and the public about legal issues relating to civil rights, including the right of access to the courts and the right to counsel. The NYC Bar also seeks to promote effective assistance of counsel for everyone and is especially concerned with protecting the confidentiality of attorney-client communications as essential to such representation.

Over the past several years, the NYC Bar has attempted to demonstrate by various means that individual liberties need not be subverted by governmental power during times of war, and that national security can be achieved without prejudice to constitutional rights that are at the heart of our democracy. Of particular relevance here, the NYC Bar co-sponsored the resolution adopted by the House of Delegates of the American Bar Association in February 2006, urging the President to halt the

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[1] Counsel of record for Petitioners and Respondents were timely notified of the intent to file this brief under S. Ct. R. 37.2(a) and have consented to its filing; their consent letters have been filed with the Clerk of the Court. No counsel for a party in this Court authored this brief, in whole or in part, and no party in this Court or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

surveillance program being conducted by the National Security Agency ("NSA") and instead, if necessary, work with Congress to amend the Foreign Intelligence Surveillance Act of 1978 ("FISA") in a way that would accommodate national security interests while also protecting individual rights. The NYC Bar also sent letters to Congress, opposing passage of the Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (2007) ("PAA"), and commenting upon pending bills in Congress that would replace the PAA. The NYC Bar filed a brief as *amicus curiae* in both the District Court and the Court of Appeals in this action.

Bar Association of San Francisco

The Bar Association of San Francisco ("BASF") is a voluntary association of more than 8,000 attorneys. The majority of its members live and work in the City and County of San Francisco, California. Through its board of directors, its committees, and its volunteer programs, BASF has consistently worked for many years to protect against government abuses and to promote public accountability of law enforcement agencies. BASF has also actively worked to promote unfettered communications between lawyers and clients. BASF believes that the NSA surveillance program at issue in this case undermines public accountability and poses a substantial threat to lawyer-client relations because it bypasses the systems of restraint and accountability required by FISA and the United States Constitution.

The Beverly Hills Bar Association

The Beverly Hills Bar Association (the "BHBA") has 4,000 members. For more than seventy years, the BHBA has dedicated itself to the advancement of the rule of law, civil rights, equal access to the courts, and judicial independence. This case involves crucial issues regarding the BHBA's historical concerns: Whether any branch of our federal government is unaccountable and above the rule of law? And, whether judicial review of executive actions can be unilaterally curtailed because of an undeclared "war on terrorism"?

Boston Bar Association

The Boston Bar Association (the "BBA") is the nation's oldest bar association, the direct successor to the earliest bar association in Boston founded by John Adams in 1761. The mission of the BBA is to advance the highest standards of excellence for the legal profession, facilitate access to justice, and serve the community at large. Throughout its history, the BBA has advocated for the preservation of the attorney-client privilege as an essential component of our adversarial system of justice. Allowing clients to communicate privately with their lawyers enables clients to secure meaningful access to the justice system. Legal representation is impaired if lawyers and their clients cannot communicate openly because of fear that the government may be listening. The BBA opposes any intrusions on the attorney-client privilege that would exceed the settled and narrow exceptions already established in American jurisprudence.

The Los Angeles County Bar Association

The Los Angeles County Bar Association ("LACBA"), with more than 25,000 members, is the largest local voluntary bar association in the country. For more than 125 years, LACBA has played an important role in the professional lives of lawyers and in the lives of the people of Los Angeles County.

LACBA, through its Professional Responsibility and Ethics Committee and other avenues, has consistently supported the sanctity of attorney-client communications, especially against government intrusion. *See, e.g., United States v. Legal Services for New York City*, 249 F.3d 1077 (D.C. Cir. 2001) (action by LACBA and other bar associations opposing government attempts to subpoena information that could identify legal services clients by name and legal problems).

LACBA has also played an important role in educating the public about the importance of maintaining civil liberties in the fight against terrorism. For example, the Dialogues on Freedom program, held annually since September 11, 2002, facilitates high school students' discussion of American freedoms and constitutional rights and highlights differences from non-democratic governments.

As the practices of the NSA challenged here threaten the attorney-client relationship and basic civil liberties, LACBA joins its fellow bar associations in supporting Petitioners.

The Philadelphia Bar Association

The Philadelphia Bar Association (the "PBA"), founded in 1802, is America's first chartered metropolitan bar association. A voluntary association, it presently has 13,000 members representing all elements of the legal profession, including some of the nation's most prominent lawyers, judges, public servants, business, and civic and community leaders, in the city where this country was born. Its commitment to liberty and justice for all lies at the heart of the PBA's mission: to serve the profession and the public by promoting justice, professional excellence, and respect for the rule of law. In so doing, the PBA strives to foster understanding of, involvement in, and access to the justice system.

Since the tragic events of September 11, 2001, the PBA has repeatedly expressed its concerns to our federal government about the abridgement of constitutional rights in the name of the "War on Terror." Although the PBA understands the very real danger of terrorism in this day and age, in times like this, the power of the Executive Branch must be reasonably restrained so as to remain consistent with the protection of our country. Unchecked, such power will cause the Constitution to be terrorism's next victim.

SUMMARY OF ARGUMENT

Amici curiae submit this brief to highlight the actual injury caused by unchecked government surveillance – whether conducted under the NSA's Terrorist Surveillance Program (the "Program") or under the PAA – on the relationship between attorneys and clients who are suspected of having ties to terrorism or terrorist organizations. As set forth below, the NSA's admitted practice of wiretapping communications in the name of national security – without a court order and pursuant to undisclosed standards never subjected to judicial scrutiny – places attorneys in the untenable ethical dilemma of choosing between diligently and competently representing their clients or protecting the confidentiality of the communications with them. The erroneous decision by the Sixth Circuit fails to acknowledge the injury inflicted upon the attorney-petitioners by the threat of government surveillance without meaningful judicial oversight.

Justice requires that persons accused by the Government of wrongdoing have access to legal advice, and that legal advice can only be effective if communications between attorneys and their clients are conducted in confidence, uninhibited by fears that government agents are listening in. The Executive Branch's legitimate national security concerns can be accommodated without compromising individual rights, and those who are injured by government surveillance – whether conducted under statutory authority or in violation of a statute – should be permitted to challenge the lawfulness of that surveillance in a court of law.

Otherwise, fundamental rights will be impermissibly and unnecessarily undermined. The attorney-petitioners have plainly suffered a special and unique harm due to the Government's unchecked surveillance, which must be subject to judicial review so that those injuries can be remedied.

ARGUMENT

I. The Court Should Grant Review to Reinforce the Fundamental Principle of Preserving the Confidentiality of Attorney-Client Communications

The principle that attorney-client communications are entitled to confidentiality is deeply rooted in our legal system. Courts have long recognized that disclosures made by clients to their attorneys to obtain legal advice are protected with a "seal of secrecy." *See, e.g., Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."). Thus, "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citation omitted).

The purpose of such confidentiality "is to encourage full and frank communication between

attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.*; *see also Fisher v. United States*, 425 U.S. 391, 403 (1976) ("[I]f the client knows that damaging information could . . . be obtained from the attorney following disclosure . . ., the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."). As this Court has noted, the attorney-client privilege recognizes the basic principle "that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn*, 449 U.S. at 389; *accord* App. 25a (District Court remarking that "[t]he ability to communicate confidentially is an indispensable part of the attorney-client relationship").

The dangers of unchecked government surveillance are particularly problematic in the attorney-client context. For example, such practices impact the right of meaningful access to the courts – an aspect of the First Amendment right to petition the government. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). The right to assistance of counsel, including the right to confidential attorney-client communications, is an integral part of that right. *See, e.g., Goodwin v. Oswald*, 462 F.2d 1237, 1241 (2d Cir. 1972) (noting that prison inmates, who have fewer First Amendment rights than non-incarcerated persons, possess the rights to access the courts, to have assistance of counsel, and to have "the opportunity for confidential communication between attorney and client").

This Court has also held that, for groups that are forced to resort to the courts to redress disparate treatment at the hands of the Government, the First Amendment protects the right to pursue litigation. *See, e.g., NAACP v. Button*, 371 U.S. 415, 428-30 (1963). The attorneys who represent these groups and challenge what they believe to be unlawful government policies similarly engage in a form of protected political expression. *Id.*; *see also In re Primus*, 436 U.S. 412, 432 (1978) ("The First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights,' including 'advis[ing] another that his legal rights have been infringed . . . .") (citations omitted).

Many of the likely targets of the Government's unchecked surveillance have been accused by the United States of somehow having ties to terrorism and are vigorously protesting their innocence against the Government. But "the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants." *Primus*, 436 U.S. at 431. Thus, surveillance without meaningful judicial oversight seriously inhibits the ability of these persons effectively to litigate because it erects barriers to communications with their attorneys, as well as barriers to communications between their attorneys and witnesses and others who reside outside the United States. *See, e.g., Turkmen v. Ashcroft*, Nos. 02 CV 2307 (JG), 04 CV 1809 (JG), 2006 WL 4483151, at *1 (E.D.N.Y. Oct. 3, 2006) (noting that "it is a cardinal rule of litigation that one side may not eavesdrop on the other's privileged

attorney-client communications," and that "[l]itigation involving officials of the executive branch of government is no exception"). These barriers curtail the speech and expression of those attorneys as well. *See Button*, 371 U.S. at 447-48 (White, J., concurring in part and dissenting in part) (finding constitutionally protected the activities of NAACP staff lawyers in, among other things, "advising Negroes of their constitutional rights").[2]

Notably, FISA recognizes the importance of preserving the confidentiality of attorney-client communications. First, FISA provides that "[n]o otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this subchapter shall lose its privileged character." 50 U.S.C. § 1806(a). Thus, to the extent that privileged communications between attorneys and clients are intercepted, they retain their privileged status, and neither the privileged communications

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[2] It is also well settled that the privacy of attorney-client communications is critical to the effective assistance of counsel guaranteed by the Sixth Amendment. *See, e.g., United States v. Chavez*, 902 F.2d 259, 266 (4th Cir. 1990) ("[A] critical component of the Sixth Amendment's guarantee of effective assistance is the ability of counsel to maintain uninhibited communication with his client and to build a 'relationship characterized by trust and confidence.'") (quoting *Morris v. Slappy*, 461 U.S. 1, 21 (1983)). By threatening the sanctity of the attorney-client relationship, unchecked government surveillance burdens all communications between those who "perceive[ ] themselves, whether reasonably or unreasonably, as potential targets" of surveillance and their attorneys. S. Rep. No. 95-604, at 8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3908 (hereinafter, "Legislative History").

nor their fruit can be used in court.[3] This strict prohibition alone deters the wiretapping of communications between attorneys and clients because future prosecutions based on evidence obtained from illegal wiretaps could be compromised.

Second, FISA generally requires prior judicial approval for electronic surveillance conducted for foreign intelligence purposes. *See generally* 50 U.S.C. § 1805. However, before issuing a surveillance "order" (FISA's equivalent of a warrant), a FISA court judge must find that the Government has adopted "minimization procedures," *see id.* § 1805(a)(4), that are "reasonably designed . . . to minimize the acquisition and retention . . . of nonpublicly available information concerning unconsenting United States persons," *id.* § 1801(h)(1). The NSA's Legal Compliance and Minimization Procedures manual, which was last modified in 1993 and governed the agency at least until the enactment of the PAA, specifically dealt with the wiretapping of attorney-client communications:

> As soon as it becomes apparent that a communication is between a person who is known to be under criminal indictment

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[3] Under FISA, individuals must be given notice if the Government intends to use the fruits of any such surveillance against a person in a criminal proceeding, and the defendant can then move to suppress the evidence. *See* 18 U.S.C. § 2518(9)-(10); 50 U.S.C. § 1806(c) & (e); *see generally United States v. Belfield*, 692 F.2d 141, 144-46 (D.C. Cir. 1982).

> and an attorney who represents that individual in the matter under indictment (or someone acting on behalf of the attorney), *monitoring of that communication will cease* and the communication shall be identified as an attorney-client communication in a log maintained for that purpose. The relevant portion of the tape containing that conversation will be placed under seal and the Department of Justice, Office of Intelligence Policy and Review, shall be notified so that appropriate procedures may be established *to protect such communications from review or use in any criminal prosecution*, while preserving foreign intelligence contained therein.

Legal Compliance and Minimization Procedures, USSID 18, Annex A, App. 1 § 4(b) (Jul. 27, 1993), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB23/07-01.htm (emphases added).

These minimization procedures recognize that the confidentiality of attorney-client communications is vital to rendering effective assistance of counsel. The provisions, moreover, have been a part of FISA since its original enactment in 1978, and they remain unaltered after the tragedies of September 11, 2001

but for a critical change introduced by the PAA with respect to international communications.

Both the Program and the PAA raise special concerns for attorneys because they do not generally require minimization procedures under the circumstances faced by the attorney-petitioners. The PAA allows the Government to conduct warrantless foreign intelligence surveillance if it is either (a) "directed at" or (b) "concerns" individuals who are "reasonably believed to be outside the United States." *See* App. 251a (PAA § 2; inserting new §§ 105A and 105B). Significantly, the PAA makes a critical distinction between these two types of surveillance, in that the PAA explicitly amended the definition of "electronic surveillance" under FISA to exclude surveillance "directed at a person reasonably believed to be outside the United States." *See id.*

The import of this change is that surveillance "directed at" communications between, for example, the attorney-petitioners and individuals overseas, when characterized as being "directed at" the individual located outside of the United States, are completely relieved of the minimization requirements mandated by FISA because, by definition, those communications do not constitute "electronic surveillance."[4] Even where the monitored

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[4] By contrast, if the surveillance "concerns persons reasonably believed to be outside of the United States," the Government is required to determine, among other things, whether "the minimization procedures to be used with respect to such acquisition activity meet the definition of minimization procedures under section 101(h)" of FISA. App. 252a (PAA § 2). The Government can, without any difficulty, freely characterize

communications fall within § 105B, the statute relegates the FISA court to reviewing only the reasonableness of the procedures used by the Government to ensure that the intercepted communications do not constitute "electronic surveillance." *See* App. 259a (PAA § 3). Moreover, the court's review is "limited to whether the Government's determination is clearly erroneous." *Id.*

In short, the PAA gives the Government broad authority to intercept international communications, while simultaneously circumscribing the role of the FISA court to oversee that surveillance. Although the PAA was enacted with a sunset provision in February 2008 unless Congress enacts reauthorizing legislation, *see* App. 263a-264a (PAA § 6(c)), the Government has repeatedly insisted that the Executive Branch has the authority to disregard those consequences insofar as it constrains its ability to conduct foreign intelligence surveillance that it deems necessary in the interests of national security.

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the communications at issue in this case as falling within either § 105A or §105B, and, thus, it may sidestep any minimization procedures (and, thereby, continue pursuing unchecked surveillance) by always characterizing them to be "directed at" the individual located overseas, *i.e.*, within § 105A.

II. The Sixth Circuit's Decision Fails to Acknowledge the Actual Injury Caused by the Threat of Unchecked Government Surveillance

The attorney-petitioners claim actual and concrete injuries resulting from the failure of the Government's warrantless surveillance practices to comply with FISA's "minimization procedures" to protect attorney-client privileged communications from interception or, if intercepted, from subsequent disclosure. As explained below, these real injuries cause the attorney-petitioners to refrain from engaging in conduct that has potentially harmful consequences to their clients in order to comply with their professional obligations. By rooting its decision solely on whether the attorney-petitioners can provide evidence that they are personally subject to the Government's surveillance, *see, e.g.*, App. 85a, the Sixth Circuit failed to acknowledge this actual injury.

On behalf of their clients, the attorney-petitioners must communicate with clients, potential fact witnesses, experts, investigators, other lawyers, journalists, government officials, political figures, and other third-parties who live and work outside the United States about subjects such as terrorism, jihad, and al-Qaeda. Because of the Government's unchecked surveillance, the attorney-petitioners have ceased overseas telephone or e-mail communications about these and related issues. *See* App. 283a-288a (Hollander Decl. ¶¶ 13-25); App. 290a-295a (Swor Decl. ¶¶ 5-16); App. 304a-313a (Dratel Decl. ¶¶ 5-20); App. 321a-322a (Abdrabboh

Decl. ¶¶ 4-9); App. 325a-329a (Ayad Decl. ¶¶ 5-9, 11).[5]

The injury caused by the NSA's warrantless surveillance practices creates a serious dilemma for attorneys who represent clients outside of the United States accused of links to al-Qaeda (including organizations allegedly affiliated with or supporting al-Qaeda), as well as attorneys with clients outside the United States who have reason to perceive themselves within the potentially broad scope of the Government's surveillance practices. The seriousness of this ethical dilemma warrants this Court's attention.

Professional responsibility rules require an attorney to provide competent, diligent, and zealous representation to his or her client. *See* App. 333a-334a (Niehoff Decl. ¶¶ 8-11). For example, the American Bar Association's Model Rules of Professional Conduct ("Model Rules") – which comport with the professional responsibility rules of many states – require an attorney to provide

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[5] The District Court credited these declarations, noting that the Program had "caused clients . . . to discontinue their communications with plaintiffs out of fear that their communications will be intercepted." App. 25a. The court also observed that attorneys now bore increased financial burdens "in having to travel substantial distances to meet personally with their clients and others relevant to their cases." *Id.* In sum, the court opined that the Government's surveillance practices had "significantly crippled" lawyers in their ability to "competently and effectively represent their clients," App. at 28a, thereby saddling clients (and lawyers who agree to represent clients on a *pro bono* basis) with extraordinary and unnecessary expenses.

competent representation to the client, including the "thoroughness and preparation reasonably necessary for the representation." Model Rule 1.1. Under Model Rule 1.4, an attorney also owes the client a duty of communication, pursuant to which he must "reasonably consult with the client about the means by which the client's objectives are to be accomplished." This communication is paramount to the attorney-client relationship because "[r]easonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation." *Id.* 1.4 cmt. ¶ 1.

These same professional responsibility rules also require an attorney to maintain the confidentiality of information relating to the representation of the client. *See id.* 1.6; *see also* App. 334a-335a (Niehoff Decl. ¶¶ 12-14). This ethical obligation is expansive and is substantially broader than the attorney-client privilege. *See* Model Rule 1.6 cmt. ¶ 3 ("The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."); *see also* App. 334a (Niehoff Decl. ¶ 12).

The attorney's fundamental duty of confidentiality "contributes to the trust that is the hallmark of the client-lawyer relationship" and encourages clients "to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." Model Rule 1.6 cmt. ¶ 2. By fostering a relationship of trust between the attorney and the client, preventing the misuse of information learned

in the course of the representation, and protecting attorney work-product from unwanted disclosure, this duty is central to the functioning of the attorney-client relationship and to effective representation. *See* App. 334a (Niehoff Decl. ¶ 12).

The lack of meaningful judicial review over the Government's surveillance practices places attorneys whose obligations require them to communicate with potential overseas targets of the Government's warrantless surveillance in a difficult ethical dilemma: either (a) discontinue their telephonic and electronic communications with these clients and risk violating their obligations of competence and candor, or (b) continue communicating with these clients at the risk of violating their professional obligation to take all reasonable steps to protect client confidences. In its decision below, the District Court credited the declaration of legal ethics professor Leonard M. Niehoff, who elaborated on this dilemma:

> On one hand, proceeding with these electronic and telephonic communications would create a substantial risk of disclosure of information deemed confidential by the ethics rules. On the other hand, failing to proceed with these communications would create a substantial risk of noncompliance with duties of diligence, competence, zealous representation, and thorough preparation. An attorney may

> be able to avoid this conflict by traveling oversees and conducting in-person interviews of individuals who have relevant personal knowledge. Such an approach, however, may not always be possible, and, when possible, will burden the representation with gross inefficiencies, substantially increased costs, and significant logistical difficulties. In sum, the [ ] Program requires the attorneys to cease – immediately – all electronic and telephonic communications relating to the representation that they have good faith reason to believe will be intercepted. And the [ ] Program requires the attorneys to resort – immediately – to alternative means for gathering information that, at best, will work clumsily and inefficiently and, at worst, will not work at all.

App. 336a-337a (Niehoff Decl. ¶ 19).

Thus, government surveillance without meaningful judicial oversight makes in-person communication virtually the only means by which attorneys and clients reasonably can be assured that their dialogue will remain confidential. Practically, however, such meetings, when compelled to take

place abroad, may become so burdensome, costly, and ineffective that *all* effective communications are curtailed.

The lack of minimization requirements under both the Program and the PAA, in contrast to the procedures mandated under FISA, only serve to highlight this dilemma. Pre-amended FISA established a detailed procedure permitting the Government to intercept international communications "without violating the rights of citizens of the United States." *United States v. Hammoud*, 381 F.3d 316, 332 (4th Cir. 2004) (*en banc*), *vacated on other grounds*, 543 U.S. 1097, *reinstated in part*, 405 F.3d 1034 (2005). *See also* 50 U.S.C. §§ 1801(h), 1821(4). FISA's minimization procedures are meant to parallel the procedures found in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* ("Title III"), "which courts have sensibly construed as not requiring the total elimination of innocent conversation." *United States v. Rosen*, 447 F. Supp. 2d 538, 551 (E.D. Va. 2006) (citation omitted).[6] Under Title III, a court's role in

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[6] In pertinent part, Title III's minimization procedures provide:

> Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

18 U.S.C. § 2518(5).

assessing the Government's minimization efforts is to determine whether "on the whole the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion." *United States v. Tortorello*, 480 F.2d 764, 784 (2d Cir. 1973).

Congress intended the minimization procedures in FISA "to act as a safeguard for U.S. persons at the acquisition, retention and dissemination phases of electronic surveillance and searches." *Rosen*, 447 F. Supp. 2d at 550-51 (citation omitted). Thus, "[a]bsent a charge that the minimization procedures have been disregarded completely, the test of compliance is 'whether a good faith effort to minimize was attempted.'" *United States v. Thomson*, 752 F. Supp. 75, 80 (W.D.N.Y. 1990) (quoting *United States v. Armocida*, 515 F.2d 29, 44 (3d Cir. 1975)).

Even before FISA was enacted, in *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297 (1972) (hereinafter, "*Keith*"), this Court had already noted – in the context of addressing warrantless wiretapping for domestic intelligence purposes, but in words equally applicable here – the degree to which unchecked surveillance is inconsistent with constitutional guarantees:

> The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security."

> Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.

Id. at 314. This Court in *Keith* also underscored the inherent danger of permitting the acts of the Executive to proceed without meaningful oversight:

> The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech. . . . The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised.

407 U.S. at 317 (citation and footnote omitted).[7]

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[7] *See also Scott v. United States*, 436 U.S. 128, 137 (1978) ("'The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.'") (quoting *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)); *Zweibon v. Mitchell*, 516 F.2d 594, 635-36 (D.C. Cir. 1975) ("To allow the Executive Branch to make its own determinations as to such matters invites abuse, and public

The legislative history of FISA further demonstrates that Congress shared this Court's view in *Keith* that warrantless searches by an unchecked Executive raised the specter of abuse, especially given the documented history of abuse in this area:[8]

> The exercise of political freedom depends in large measure on citizens' understanding that they will be able to be publicly active and dissent from official policy, within lawful limits, without having to sacrifice the expectation of privacy that they rightfully hold. Arbitrary or uncontrolled use of warrantless electronic surveillance can violate that understanding and impair that public confidence so

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knowledge that such abuse is possible can exert a deathly pall over vigorous First Amendment debate on issues of foreign policy.").

[8] For example, Congress was informed that past subjects of surveillance "ha[d] included a United States Congressman, Congressional staff member, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security, such as two White House domestic affairs advisers and an anti-Vietnam War protest group'" Legislative History at 8 (internal quotations and citation omitted). Furthermore, claims of national security had sometimes been used to justify warrantless wiretapping of members of the Democratic Party, ostensibly because the Executive Branch had boundlessly defined the term "dissident group." *United States v. Falvey*, 540 F. Supp. 1306, 1309 (E.D.N.Y. 1982).

> necessary to an uninhibited political life.

Legislative History at 8.

By contrast, under the Program, no minimization procedures were required; and under the PAA, minimization requirements are only mandated under severely limited circumstances.[9] Moreover, even when minimization requirements are mandated under the PAA, the FISA court's role is relegated to reviewing only whether the Government's determination – that reasonably designed procedures were used to ensure that the intercepted communications do not constitute electronic surveillance – was clearly erroneous. *See* App. 259a (PAA § 3).

Thus, the Government's current warrantless surveillance practices as to international communications do not require any minimization procedures whatsoever. And when the Government is free to disregard any minimization requirements when conducting surveillance, individuals such as the attorney-petitioners here have only the Government's assertions of "good faith" that any efforts at all were made to minimize the monitoring of privileged communications. *Cf. Thomson*, 752 F. Supp. at 80 ("Absent a charge that the minimization procedures have been disregarded completely, the

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[9] *See supra* note 4 and accompanying text (discussing inherent ease with which the Government can sidestep any minimization procedures required under the PAA by simply characterizing the communications at issue to serve its interests).

test of compliance is whether a good faith effort to minimize was attempted.") (internal quotations and citation omitted).

The lack of any true minimization requirements under either the Program or the PAA have interfered, and will continue to interfere, with the ability of attorneys to meet their professional obligations by placing them in the middle of an ethical quandary, thereby giving rise to an actual injury. Without doubt, unchecked government surveillance raises serious ethical concerns, as the District Court found. *See* App. 25a (finding that the Program poses "'an overwhelming, if not insurmountable, obstacle to effective and ethical representation'") (quoting App. 336a (Niehoff Decl. ¶ 19)); *see also* App. 335a ("In my opinion, the [ ] Program imposes an immediate, substantial, and gravely serious burden upon the representation being provided by these attorneys to their clients.") (Niehoff Decl. ¶ 16). Indeed, its pernicious effects may be even worse than currently realized because of the potentially vast (and unknown) scope of attorney-client communications being monitored.

Accordingly, the attorney-petitioners' apprehension that privileged communications are being improperly monitored is not only eminently reasonable, but an actual and immediate harm. *See, e.g., Turkmen v. Ashcroft*, Nos. 02 CV 2307 (JG), 04 CV 1809 (JG), 2006 WL 4483151, at *1 (E.D.N.Y. Oct. 3, 2006) (holding that the plaintiffs' request for further assurances is reasonable in view of, among other things, the Government's claim that it has "the authority – indeed, the necessity – to monitor

suspected terrorists abroad making electronic communications into the United States, and to do so without any judicial oversight"). Thus, because the threat of government surveillance causes these injuries, it must be subject to judicial review so that these injuries can be remedied.

The attorney-petitioners present a specific, immediate, and special kind of harm flowing from the reasonable fear that unchecked government surveillance will intercept privileged communications, and not simply some generalized fear of the Government's future misuse of their intercepted communications. *See, e.g., id.* (stating that the plaintiffs "are fearful that under [the Program], . . . the defendants are listening to their privileged communications with their lawyers in the United States," and that "regardless whether the plaintiffs are actually involved in terrorist activity . . . they have reason to believe that the government thinks they are, and that they are therefore being monitored when they call the United States").

Moreover, as the dissenting opinion in the Sixth Circuit noted, *see* App. 187a, the attorney-petitioners amply demonstrated the connection between their injuries and the impact of government surveillance without meaningful judicial oversight. High-ranking government officials have publicly acknowledged that the surveillance practices involve intercepting communications where the Government "ha[s] a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in

support of al Qaeda." Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html. These parties are precisely the kind of clients that the attorney-petitioners represent, and, thus, the surveillance practices constitute a "genuine threat" of harm to them. *See Steffel v. Thompson*, 415 U.S. 452, 475 (1974).

Finally, as attorneys, these petitioners are uniquely situated from other potential challengers of the Government's warrantless surveillance practices because the nature of their injuries stem from their specific professional and ethical obligations, and, in particular, the vigilant application of the attorney-client privilege and the preservation of client confidences. Thus, the attorney-petitioners have more than sufficiently established a well founded fear that constitutes an "actual," "imminent," "concrete," and "particularized" harm resulting from the Government's unchecked surveillance practices.

CONCLUSION

For the foregoing reasons and the reasons presented by Petitioners, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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